**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| LABIB RIACHI, | ) Civil Action No. 16-cv-02749-SDW-LDW |
| *Plaintiff,* | ) **DEFENDANT THE PROMETHEUS GROUP'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT** |
| v. | ) |
| THE PROMETHEUS GROUP, FIRST CHOICE FOR CONTINENCE, INC. AND JANE DOES 1-4 AND JOHN DOES 1-4, | ) Motion Date July 18, 2016 |
| | ) Oral Argument Requested |
| *Defendants.* | ) |

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## PRELIMINARY STATEMENT

Defendant The Prometheus Group ("Prometheus") respectfully submits this Memorandum of Law in support of its Motion to Dismiss all counts in Plaintiff's Complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Plaintiff Labib Riachi ("Riachi") is a urogynecologist and the head of the Center for Advanced Pelvic Surgery ("CAPS") in Elizabeth and Westfield, New Jersey. In February of 2016, the U.S. Government filed a civil False Claims Act lawsuit against Riachi alleging that he submitted thousands of false claims to the Medicare and Medicaid programs ("CMS") for therapy services that he never performed or that were not medically necessary ("USA Complaint"). Riachi promptly settled with the Government for $5.25 million.

Incredibly, Riachi now brings this suit against Prometheus -- from whom he purchased medical equipment -- alleging that he relied on misrepresentations made by Prometheus and the other Defendants regarding the manner in which to bill the disputed services. According to Riachi, these misrepresentations -- not one of which is described in the Complaint -- led to the USA Complaint and eventual settlement. Because Riachi's claims -- to the extent they are comprehensible at all -- fail to satisfy basic pleading requirements, this Court should dismiss Plaintiff's Complaint in its entirety.

## STATEMENT OF FACTS[1]

For many years, Riachi was one of the top Medicare billers in the country for anorectal manometry, an invasive diagnostic test that involves inserting a probe into a patient's rectum. *See* USA Complaint, attached hereto as *Exhibit A* at ¶ 1. Riachi was also among the top Medicare billers for electromyography, another diagnostic test. *Id.* But according to the U.S. Government, most of these tests were never performed. *Id.* Instead, according to the USA Complaint, "Riachi's unqualified, non-physician staff treated his patients to little more than physical therapy." *Id.* at 2. And because Medicare only covers therapy services that a licensed therapist provides -- and Riachi did not employ a single licensed therapist -- even these claims should not have been paid. *Id.* According to the USA Complaint, Riachi would falsely sign the patient's chart as if a qualified therapist had performed the therapy and the diagnostic tests had actually been performed. *Id.* at 3. The USA Complaint also alleges that not only were these diagnostic tests not performed, but that on many of the dates that Riachi certified that he performed tests in New Jersey, he was actually in Germany or France. *Id.* at 86-87.

Riachi purchased equipment from Prometheus. *Id.* at 17-18. And Riachi alleges that in the course of providing care to his patients, he relied upon the guidance and advice given to him by Prometheus in conjunction with his purchase. *Id.* at 11, 17. As a result of the United States "investigation" and "pressure", Riachi settled with the United States by "paying a reimbursement

[1] These facts are taken from the Complaint, which, for purposes of this Motion, the Court must accept as true, provided the allegations are "well pleaded." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). In addition, these facts include the allegations in the USA Complaint because the Court may consider "'a document integral to or explicitly relied upon in the complaint,' whether or not the document is attached to the challenged pleading." *Yogo Factory Franchising, Inc. v. Ying*, 2014 U.S. Dist. LEXIS 61968, at *14 (D.N.J. 2014) (quoting *In Re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)). Relatedly, "a court may consider an undisputedly authentic document that a defendant attache[s] as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefits Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

of several million dollars." Compl. ¶ 24. Riachi alleges that he "did nothing wrong" and that he "relied appropriately on the guidance and advice of professional Defendants Prometheus and First Choice." *Id.* Riachi alleges that Prometheus is therefore liable for his "damages." *Id.*

**STANDARD OF REVIEW**

When assessing a motion to dismiss for failure to state a claim under Rule 12(b)(6) a court must first separate the factual and legal elements of the claims, and accept all of the well pleaded facts as true. *Fowler*, 578 F.3d at 210-11. And all reasonable inferences must be drawn in the non-movant's favor. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 314 (3d Cir. 2010). To survive a motion to dismiss, however, the court must determine whether the complaint "contains sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Aschcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is only plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Specifically, when assessing the sufficiency of a complaint, a court must distinguish factual contentions from "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678. Legal conclusions are "not entitled to the assumption of truth." *Id.* at 679. Rather, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* In other words, "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

## ARGUMENT

### A. The USA Complaint Is Properly Considered By The Court In Deciding This Motion.

As set forth above, although courts reviewing a motion to dismiss normally disregard material outside the four corners of the complaint, courts may consider "'a document integral to or explicitly relied upon in the complaint,' whether or not the document is attached to the challenged pleading." *Yogo*, 2014 U.S. Dist. LEXIS 61968, at *14 (quoting *In Re Burlington*, 114 F.3d at 1426). Relatedly, "a court may consider an undisputedly authentic document that a defendant attache[s] as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefits Guar. Corp*, 998 F.2d at 1196. Even if a "[c]omplaint does not explicitly refer to or cite [a document] . . . the critical [issue] is whether the claims in the complaint are 'based' on an extrinsic document and not merely whether the document was explicitly cited." *In re Burlington*, 114 F.3d at 1426. A court "need not accept allegations as true that are contradicted by the documents upon which a party's claims are based." *Id.* (citation omitted).

Riachi's complaint against Prometheus -- and the damages he alleges -- are based on the $5.25 million settlement that he made with the U.S. Government in the civil False Claims Act lawsuit. *See United States of America v. Labib Riachi M.D.*, 2:16-cv-00730-CCC-JBC (D.N.J. February 10, 2016). Throughout his Complaint in the present case, Riachi describes how he was investigated, accused, and sued by the U.S. Government for improperly billing Medicare and Medicaid. Riachi claims that he was "forced to pay millions of dollars back to the United States government due to the conduct of the Defendants." Compl. ¶¶ 13, 24. He even goes so far as to claim that the lawsuit and settlement arose "solely because Riachi relied on the professional advice of the Defendants." *Id.* ¶ 13. Because Riachi's claims and alleged damages in this case are based entirely on the civil False Claims Act case, the USA Complaint is integral to this case and this Court should use it as a lens through which to view this Motion to Dismiss.

### B. Plaintiff's Breach of Contract Claim Fails Because The Complaint Does Not Adequately Plead The Existence Of A Contract, Does Not Specify What Provisions Of The Alleged Contract Prometheus Has Breached And Does Not Identify Any Contract Damages.

The Complaint barely mentions the existence of a contract between Riachi and Prometheus. It is axiomatic that to plausibly demonstrate a breach of contract, a plaintiff must plead the existence of a contract. *See Murphy v. Implicito*, 920 A.2d 678, 689 (N.J. App. Div. 2007) ("To establish a breach of contract claim, a plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result."). Here, the Complaint's only express reference to a contract is: "From the time Dr. Riachi first engaged the Defendants and contracted for their services…" Compl. ¶ 12 (emphasis added). Otherwise, the Complaint fails to allege the parties to this alleged contract, when the parties entered into the contract, the purpose of the contract, the parties' respective obligations under the contract, or any other basic details of the alleged contract. This single conclusory statement is insufficient to plausibly support Riachi's breach of contract claim. *See, e.g., Fennimore v. Bank of Am.*, 2015 U.S. Dist. LEXIS 153980, at *29 (E.D. Pa. Nov. 12, 2015) (to adequately plead a breach of contract claim a plaintiff must "establish the existence of a contract, *including its essential terms*….") (emphasis added). Prometheus cannot possibly defend itself where it does not even know the contract which it is said to have breached.

Even if this Court finds that Riachi's vague reference to a contract suffices, this Court should still dismiss his contract claim because the Complaint does not specify how Prometheus breached the contract. *See In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 549 (D.N.J. 2004) (dismissing contract claim because "there must be some indication of what contractual obligation a defendant has breached."); *Eprotec Pres., Inc. v. Engineered Materials, Inc.*, 2011 U.S. Dist. LEXIS 2432, at *8 (D.N.J. Mar. 9, 2011) ("Under New Jersey law, a complaint alleging breach of contract must, at a minimum, identify the contract and the provisions breached."). The Complaint states that Riachi relied to his detriment on allegedly false representations that the Defendants made about how he should bill Medicare and Medicaid for pelvic floor therapy services. Compl. ¶13. Yet, the Complaint omits any facts alleging that the parties' contract required Prometheus to supply Riachi with any billing guidance for services performed in connection with the pelvic muscle rehabilitation system that Prometheus sold Riachi in 2006. Compl. ¶ 16.

Moreover, the Complaint lumps the Defendants together, and completely fails to cite, quote, or at least generally allege the specific provisions of the contract that Prometheus breached. In the absence of any reference to what provisions were breached, or how they were breached, this Court should dismiss Count I for failure to state a claim.

The Complaint similarly omits any mention of contract damages and does not explain how Prometheus' alleged breach of contract actually caused Riachi "damages". This omission is fatal. The only damages alleged in the Complaint are the "several million dollars" that Riachi paid in settlement to the Justice Department to settle the USA Complaint against him and his practice. Compl. ¶ 24. Even if the Court were to accept that Prometheus provided Riachi with incorrect advice regarding how to bill his claims, those were not the allegations made against him in the USA Complaint. The USA Complaint alleges that Riachi billed Medicare for services that he never performed or for services or procedures that were not medically necessary. Ex. A at 1-3, 82-112. And the Complaint's failure to allege how this was caused by Prometheus is fatal.

### C. Plaintiff's Implied Covenant Claim Fails Because The Complaint Does Not Allege The Existence Of A Contract Or That Prometheus Had An Improper Motive Or Deprived Riachi Of The Benefits Of The Parties' Bargain.

If this Court dismisses Riachi's contract claim, it must also dismiss his implied covenant of good faith and fair dealing count because if there is no contract, then there is no agreement from which the covenant can be implied. *See, e.g., Brunswick v. Route 18 Shopping Ctr.*, 864 A.2d 387, 389 (N.J. 2005) (noting that there is a covenant of good faith and fair dealing implied in every contract).

But even if this Court allows Riachi's contract claim to proceed, this Court should still dismiss the implied covenant count because the Complaint contains no allegation that Prometheus had an improper motive when it made the alleged misrepresentations to Riachi. "Proof of 'bad motive or intention' is vital to an action for breach of the covenant [of good faith and fair dealing." *Brunswick* 864 A.2d at 396; *see also Elliot & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.2d 312, 319 (3d Cir. 2006) ("[B]ad motive or intention is essential, and an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract absent improper motive."). Put simply, the Complaint contains no allegations, which even suggest that Prometheus acted in bad faith or with an improper motive. Although Riachi alleges "false misrepresentations," he never contends that Prometheus had an improper motive when making these representations. Notably, he also does not explain what Prometheus would have gained from offering him incorrect billing advice. Logically, Prometheus would have had no motive to do so because Prometheus did not share in Riachi's Medicare or Medicaid reimbursement or otherwise benefit from Riachi's scam. Prometheus merely sold him a medical device.

Likewise, the Complaint fails to specify the benefit or benefits of which Riachi has been deprived. To state a claim for breach of the implied covenant of good faith and fair dealing, Riachi must allege sufficient facts to plausibly suggest that Prometheus "engaged in some conduct that denied the benefit of the bargain originally intended by the parties." *Brunswick*, 864 A.2d at 396 (citation omitted). The Complaint does not discuss the substance of the parties' contract or the benefits of which Riachi claims he has been deprived. Instead, Riachi resorts to labels, vagaries, and legal conclusions. Compl. ¶ 34 ("Defendants have breached the implied covenant of good faith and fair dealing in the Agreement between them and Dr. Riachi, and have deprived Dr. Riachi of the benefit of his bargain."). Riachi's failure to plead these two essential elements of an implied covenant claim is fatal.

### D. Plaintiff's NJ Consumer Fraud Act Claim Fails To Plead Fraud With Particularity, Challenges A Sales Transaction That Is Not Subject To Protection Under The CFA, And Fails To Demonstrate A Causal Nexus Between Prometheus's Alleged Conduct And His Alleged Damages.

The Complaint omits the essential "Who, What, Where, When, and Why" of the misrepresentations that serve as the basis for the New Jersey Consumer Fraud Act claim as required by the heightened Federal Rule of Civil Procedure 9(b) pleading standard applicable to Consumer Fraud Act ("CFA") claims. To state a CFA claim, a plaintiff must allege: "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir. 2007). The heightened Rule 9(b) pleading requirements applicable to common law fraud claims also apply to CFA claims. *Slim CD, Inc. v. Heartland Payments Sys.*, No. 06-2256, 2007 U.S. Dist. LEXIS 62536, at *32 (D.N.J. Aug. 22, 2007); *Hoffman v. Hampshire Labs, Inc.*, 963 A.2d 849, 853 (App. Div. 2009) ("Because a claim under the CFA is essentially a fraud claim, the rules require that such claims be pled with specificity to the extent practicable."). In *Frederico*, 507 F.3d at 200, the Third Circuit explained what must be alleged to satisfy the heightened Rule 9(b) pleading standard:

> Pursuant to Rule 9(b), a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to the place the defendant on notice of the 'precise misconduct with which [it is] charged.' To satisfy this standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject previous or some measure of substantiation into a fraud allegation.

In other words, Rule 9(b) requires Riachi to plead the "who, what, when, where, and how: the first paragraph of any newspaper story." *Tremco Can. Div. RPM Can. v. Dartronics, Inc.*, 2013 U.S. Dist. LEXIS 78164, at *5 (D.N.J. June 4, 2013) (quoting *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999).

The Complaint contains almost no details about the alleged "false misrepresentations" that serve as the basis for Riachi's CFA claim. As noted above, the U.S. Government sued Riachi for billing services that were not rendered and that were not medically necessary. *Exhibit A*. He then settled the lawsuit by paying the Government $5.25 million. *Id.* Throughout his Complaint, Riachi vaguely alleges that "the conduct of the Defendants caused Riachi to incur millions of dollars of damages", and that he was "forced to pay millions of dollars back to the U.S. Government . . . solely because Riachi relief on the professional advice of the Defendants." Compl. ¶¶ 6, 13. He also proclaims that he has "recordings", "statements", and "e-mails" from the Defendants to prove the alleged "false and erroneous misrepresentations." *Id.* ¶ 26. But the Complaint is completely devoid of any specifics about the "who, what, where, when, any why" of the alleged misrepresentations.

Viewing the Complaint charitably to Riachi, Prometheus -- through its alleged agent First Choice for Continence -- made false or erroneous representations to Riachi regarding: (a) the acceptable use of Prometheus's pelvic muscle rehabilitation system; (b) proper billing procedures for therapy services performed using the rehabilitation system; (c) coding of therapy services associated with the rehabilitation system; and (d) First Choice's competence and expertise associated with use and billing of the rehabilitation system. Compl. ¶¶ 12, 18-19, 34. Nonetheless, despite stating that he has recordings, statements, and e-mails to verify the alleged misrepresentations, the Complaint provides no details whatsoever about: (i) which of the Defendants made the alleged misrepresentations; (ii) the precise false or misleading representations that were made; (iii) when the alleged misrepresentations were made; (iv) where the misrepresentations were made (i.e., in person, via e-mail, via telephone, etc.); or (v) why they were false or misleading. What's more, Riachi lumps the Defendants together and repeatedly cites "false or erroneous misrepresentations". There is simply no meat on the bone, and not enough details to satisfy Rule 9(b).

This Court has dismissed fraud claims under similar circumstances and should do so here. *See, e.g., Yogo*, 2014 U.S. Dist. LEXIS 61968, at *20 (dismissing fraud claim where Defendants "fail[ed] to specify which member of the YFF Party made what alleged misrepresentation and when" and "have not specified anywhere exactly what was materially misrepresented."); *Tremco*, 2013 U.S. Dist. LEXIS 78164, at *9-10 ("Merely asserting that Dartronics made 'false promises' without giving any factual detail in support of that statement is not enough to state a viable [CFA] claim. Statements which parrot the element of a claim without asserting facts to support that element do not satisfy . . . the particularity requirements of Rule 9(b)"). Because Riachi's CFA claim is "entirely made of legal conclusions" leaving the Defendants to guess at the "who, what, when where, how of the events at issue", this Court should dismiss Count III for failure to state a claim upon which relief can be granted. *Yogo*, 2014 U.S. Dist. LEXIS 61968, at *21.

In addition, the pelvic muscle rehabilitation system that Riachi purchased from Prometheus is not a consumer good sold to the public at large subject to protection under the CFA. The CFA is intended to protect consumers who purchase "goods or services generally sold to the public at large." *Marascio v. Campanella*, 298 N.J. Super. 491, 499 (App. Div. 1997). The "entire thrust of the NJCFA is 'pointed to products and services sold to consumers in the public sense.'" *Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.*, 226 F. Supp. 2d 557, 561 (D.N.J. 2002) (quoting *Neveroski v. Blair*, 358 A.2d 473, 480 (N.J. App. Div. 1976)). The CFA "is intended to protect consumers by eliminating sharp practices and dealings in the marketing of merchandise and real estate." *Lemelledo v. Beneficial Mgmt. Corp.*, 696 A.2d 546 (N.J. 1997). Thus, the CFA "is not intended to cover every transaction in the marketplace, but, rather, '[i]ts applicability is limited to consumer transactions which are defined both by the status of the parties and the nature of the transaction itself.'" *Cetel v. Kirwan Fin. Group, Inc.*, 460 F.3d 494, 514 (3d Cir. 2006) (quoting *Arc Networks, Inc. v. Gold Phone Card Co.*, 756 A.2d 636, 637 (N.J. Super. Ct. App. Div. 2000)).

In 2006 Prometheus sold Riachi a cutting edge pelvic muscle rehabilitation system to be used in connection with pelvic floor physical therapy. Compl. ¶ 16. This rehabilitation system is not sold to the general public. As made clear in the Complaint and the USA Complaint, this rehabilitation system can only be used by a licensed therapist under the supervision of a physician. Compl. ¶¶ 19-23; *Exhibit A*. Prometheus does not market these highly complex medical systems to the general public, but instead sells these systems to physicians, therapists, and institutional providers. As a result, this Court need go no further and should dismiss Count

III for failure to satisfy an essential element of a CFA claim, namely fraud or misrepresentation made "in connection with the sale or advertisement of merchandise" to "the public for sale." N.J.S.A. 56:8-1(c).

In addition, the CFA is inapplicable to the alleged billing consulting services that Defendants allegedly provided to Riachi because these services were incidental to a sale of goods. This Court has held that services provided incidental to a sale of covered goods are not protected by the CFA. *See, e.g., Bracco*, 226 F. Supp. 2d at 561. In *Bracco*, the plaintiff manufacturer sued the defendant wholesaler claiming a violation of the CFA for fraudulent practices in connection with the defendant's provision of ancillary accounting, inventory, and charge-back processing services to the plaintiff. The defendant moved to dismiss because it did not sell the challenged services directly or indirectly to the public. The Court agreed holding that services provided incidental to a contract that are not sold or marketed directly to the public are not covered by the CFA. *Id.* *Accord Windsor Card Shops, Inc. v. Hallmark Cards, Inc.*, 957 F. Supp. 2d 562 (D.N.J. 1997) (holding that financial planning, store planning, and merchandising services were "collateral to a contract for the sale of products to a wholesaler… [a]s such they do not qualify Windsor as a consumer under the CFA.").

Like the defendants in *Bracco* and *Windsor*, Riachi complains that the billing advice provided incidental to the medical device sales contract was incorrect and erroneous. The Complaint does not allege that Prometheus marketed these billing consulting services to the general public or even to him. At best, these are services provided ancillary to a contract for non-consumer goods and thus, this transaction is not subject to protection under the CFA.

Even if this Court accepts all allegations in the Complaint as true, Riachi cannot possibly demonstrate the required causal nexus between his settlement for fraudulently billing services and Prometheus's conduct. An essential element of a CFA claim is "a causal relationship between the unlawful conduct and the ascertainable loss." *Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741, 749 (N.J. 2009). Thus, even if Prometheus or its agents made false statements to Riachi about how to bill pelvic floor therapy services, and who must observe the services, these misrepresentations had nothing to do with Riachi billing for services that were never provided, or that were not medically necessary, which are the bases for the claims in the USA Complaint—and the only damages alleged in the Complaint. *See Exhibit A*. Therefore, the Complaint fails to plead the essential causal nexus element and Count III should be dismissed.

### E. Plaintiff's Fraud Claim Lacks The Required Particularity And Is Barred By The Economic Loss Doctrine.

Plaintiff's fraud claim fails for the same reasons as his CFA claim – he fails to plead with particularity. Pursuant to Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The fraud claim is based on the same underlying allegations as the CFA claim. Count IV contains conclusory allegations about how "the statements made by Defendants" were "false" and were "intentionally, recklessly or negligently made". Compl. ¶¶ 36-40. But again, the Complaint does not specify what statements were made, which Defendant made the statements, when the statements were made, why they were false, or how these statements caused Riachi to settle with the U.S. Government for $5.25 million. Using any metric, the Complaint fails the heightened particularity standard required by Rule 9(b) and, thus, this Court should dismiss Count IV.

The economic loss doctrine also bars Riachi's fraud claim. The economic loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement only flows from a contract." *Bracco,* 226 F. Supp. 2d at 562. New Jersey courts have held that fraud claims may co-exist with contract claims, but only where the claim involves fraud in the inducement of a contract. *Id.* at 563. Unlike fraud in the inducement claims, New Jersey courts have held that fraud in the performance claims are barred by the economic loss doctrine. *Id.* The "critical issue" in discerning whether the economic loss doctrine bars a fraud claim is whether "the allegedly tortious conduct is extraneous to the contract." *Emerson Radio Corp. v. Orion Sales, Inc.*,2000 U.S. Dist. LEXIS 487, at *22 (D.N.J. 2000).

Because the Complaint pleads a fraud in the performance theory, this Court should dismiss the fraud count as barred by the economic loss doctrine. The Complaint does not allege that Prometheus's misrepresentations fraudulently induced Riachi to enter into a contract. Instead, Riachi complains that he engaged the Defendants to "provide him with proper advice" and that "he was [] defrauded by the Defendants who have him false and erroneous advice." Compl. ¶ 13. Specifically, the timeline set forth in the Complaint confirms that the alleged misrepresentations were made after the parties contracted. *See* Compl. ¶¶ 16-19 (noting that Riachi purchased the pelvic muscle rehabilitation system from Prometheus in 2006 and then Defendants gave "erroneous and false advice."). Put another way, the Complaint never alleges that Defendants' misrepresentations led Riachi to purchase equipment from Prometheus or to accept billing and training consulting services from the Defendants. Instead, the Complaint suggests that Defendants offered bad or incorrect advice once the parties' contractual relationship already existed. Under these circumstances the claim is one of fraud in the performance, and should be dismissed for failure to state a claim upon which relief can be granted. *See, e.g., Bracco*, 226 F. Supp. 2d at 563 ("[C]laims for fraud in the performance of a contract, as opposed to fraud in the inducement of a contract, are not cognizable under New Jersey law.").

**F. This Court Should Dismiss Count V - Negligent Misrepresentation, Because The Claim Is Not Pled with Particularity, Is Barred By The Economic Loss Doctrine, And Prometheus's Conduct Was Not The Cause Of Riachi's Damages.**

The Complaint does not plead negligent misrepresentation with particularity. Like fraud claims, New Jersey courts require negligent misrepresentation claims to be pled with particularity. *See, e.g., ADS Associates Group, Inc. v. Orianti Sav. Bank*, 99 A.3d 345, 360 (N.J. 2014). Similarly, where fraud and negligent misrepresentation claims are based on the same underlying facts, courts have held that the negligent misrepresentation must also be pled with particularity under Rule 9(b). *See, e.g., American Realty Trust, Inc. v. Travelers Cas. & Surety Co. of Am.*, 362 F. Supp. 2d 744, 749 (N.D. Tex. 2005) ("Rule 9(b) operates to require the dismissal of a negligent misrepresentation claim when an inadequate fraud claim is so intertwined with [a] negligent misrepresentation claim that is not possible to describe a simple redaction that removes the fraud claim while leaving behind a viable negligent misrepresentation claim."). For the same reasons set forth above with regard to the fraud and negligent misrepresentation claims, this Court should dismiss the negligent misrepresentation claim because it is not pled with specificity.

Also, the economic loss doctrine bars the negligent misrepresentation claim. "Tort principles more adequately address the creation of an unreasonable risk of harm when a person or other property sustains accidental or unexpected injury." *Alloway v. General Marine, L.P.*, 695 A.2d 264, 628 (N.J. 1997). "Whether a tort claim can be asserted alongside a breach of contract claim depends on whether the tortious conduct is extrinsic to the contract between the parties." *Arcand v. Brother Intern. Corp.*, 673 F. Supp. 2d 282, 308 (D.N.J. 2009) (citation omitted). As described above in Section (B), the Complaint omits any of the basic details about the parties' contract thus preventing this Court or Prometheus from ascertaining whether the alleged tortious conduct is extrinsic to the contract between the parties. Additionally, Riachi claims that "the Defendants had a duty of care to Riachi to provide correct advice to Riachi." If this duty existed, it originated in the parties' contract, not a general tort duty. New Jersey courts have dismissed negligent misrepresentation claims where the parties are in privity of contract. *See, e.g., Commerce Bancorp, Inc. v. BK Intern. Ins. Brokers, Ltd.*, 490 F. Supp. 2d 556, 564 (D.N.J. 2007); *Diebold, Inc. v. Continental Cas. Co.*, 2008 U.S. Dist. LEXIS 29308 at *7 (D.N.J. April 10, 2008).

Even if Prometheus made misrepresentations about the billing or supervision requirements for various therapy services, these misrepresentations did not actually or proximately cause Riachi's damages, which stem directly from Riachi's billing of services that he never provided or were not medically necessary. It is axiomatic that to prevail on a negligent representation claim in New Jersey, a plaintiff must prove that the defendant's conduct is the proximate cause of his or her injury. *See, e.g., Roll v. Singh*, 2008 U.S. Dist. LEXIS 50125, at *62 (D.N.J. 2008). Proximate cause "is an efficient cause, one that naturally and necessarily sets the other causes in motion and without which the observed effect would not have followed." *Mitchell v. Friedman*, 78 A.2d 417, 419 (N.J. App. Div. 1951). Here, the USA Complaint makes clear that the FCA claims filed against Riachi directly stem from his billing for services that he never performed or that were not medically necessary. *See Exhibit A*. Even if Prometheus or its contractor provided erroneous or false information about how to bill claims, there is no allegation that Prometheus told Riachi to bill for unnecessary or unperformed work. In other words, the only conduct of which Riachi complains -- misrepresentations about billing and supervision -- cannot be said to be a proximate cause or substantial factor in his damages. The damages he alleges -- settlement of the USA Complaint -- were based on his sham operation. Therefore, this Court should dismiss Count V.

### G. This Court Should Dismiss Count VI – Negligence Because The Economic Loss Doctrine Bars The Claim And Prometheus's Conduct Is Not The Proximate Cause Of Riachi's Damages.

Riachi's negligence claim is also barred by the economic loss doctrine for the same reasons the negligent misrepresentation claim is barred. As described above in Section (B), the Complaint omits any of the basic details concerning the parties' contract thus preventing this Court or Prometheus from ascertaining whether the alleged tortious conduct is extrinsic to the contract between the parties. Additionally, Riachi claims that "the Defendants had a duty of care to Riachi to provide correct advice to Dr. Riachi." If this duty existed, it originated in the parties' contract, not a general tort duty.

Furthermore, for the same reasons discussed above with respect to the negligent misrepresentation count, this Court should dismiss Count VI on the basis that Prometheus's conduct could not have been the proximate cause of Riachi's alleged injuries.

### H. This Court Should Dismiss Count VII - Unjust Enrichment Because The Complaints Fails To Specify What Benefit Was Conferred Upon Prometheus For Which It Would Be Unjust For Prometheus To Retain.

To establish a claim for unjust enrichment, Riachi must show "both that defendant received a benefit and that retention of that benefit without payment would be unjust." *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710 (N.J. 2007). Unjust enrichment "is typically involved in a quasi-contractual setting, when plaintiff seeks to recover from defendant for a benefit conferred under an unconsummated or void contract." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 912, 936 (3d Cir. 1999). In this case, the Complaint neither alleges that

Prometheus was enriched at the expense of Riachi nor cites any payment or benefit conferred upon Prometheus whatsoever -- let alone payments or benefits conferred upon Prometheus for services performed wholly outside the scope of the alleged contract. Under these circumstances, this Court should dismiss Count VII for failure to state essential elements of the claim. *See, e.g., Moser v. Milner Hotels, Inc.*, 78 A.2d 393, 394 (N.J. 1951) ("It is a well settled rule that an express contract excludes an implied one. An implied contract cannot exist when there is an existing express contract about the identical subject.") (internal quotations omitted); *accord Strategic Reimbursement, Inc. v. HCA, Inc.*, 2007 U.S. Dist. LEXIS 57052, at *7 (N.D. Ill. Aug. 2, 2007) ("A contract implied in fact cannot coexist with an express contract when they involve the same subject matter."); 17 C.J.S. Contracts § 7 (2010) ("There can be no claim for unjust enrichment when express contract exists between parties.").

## CONCLUSION

For the reasons set forth above, this Court should dismiss all seven claims in Riachi's Complaint.

Dated June 23, 2016

Respectfully submitted,

s/ *Susan C. Cassell*

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**CERTIFICATION**

I hereby certify that on June 23, 2016, I caused the Notice of Motion to Dismiss, Memorandum in Support with Exhibit, and Proposed Order to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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Dated: June 23, 2016

*/s/ Susan Cassell*
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